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IN THE

Supreme Court of the United States

October Term, 1961.

No. 282.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.,
Respondents.

BRIEF FOR RESPONDENTS.

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QUESTIONS PRESENTED.

Where the parties to an action are a longshoreman making a claim for personal injuries against a shipowner and the shipowner joining the stevedore contractor in an action for indemnity:

1. Is any Seventh Amendment jury trial right involved where the contract sued upon is a maritime contract and, additionally, the stevedore-third-party defendant has filed no demand for jury trial?

2. Where the liability of the shipowner has been determined by special verdict of a jury answering interrogatories and the charge of the court has specified particular grounds which would form a basis for answering the interrogatories [as opposed to a general verdict], should not the reviewing Court pass upon the legal questions raised by the respondent shipowners' Rule 50(b) motion?

3. If the reviewing Court finds by applying established rules of law to the evidence that all possible grounds supporting the judgment against the defendant shipowner would require that it be indemnified by the stevedore, should not it then enter the appropriate judgment as a matter of law upon the shipowners' Rule 50(b) motion?

STATEMENT OF THE CASE.

We do not differ with the broad history of the present case as outlined in the petitioner's statement except upon two points.

At page 4 of its statement, the last sentence of the long paragraph on that page is not a fair or accurate statement. It is only half correct. The sentence pertains to bales falling "while being lifted *vertically*". [Emphasis ours.] The evidence in the case is that hooks were inserted under the straps around bales which were tightly stowed in the hold of the respondent's ship. This was the petitioner's method of unloading. It had been criticized by the ship's chief officer as dangerous and was not the method used in loading.

Once the hooks were placed under the bands of the bales which were tightly packed in the stow, the bales were pulled out of place, dragged across the hold [R25a, 129a] and then lifted. The evidence was that in 3 to 5% [R89a, 131a] of the bales so handled, experience dictated that breaking of the bands occurred. Petitioner is careful to include the word "vertically", but that does not create a full or fair picture when the other facts are considered. The hooks under the bands were in place during the break-out and drag operation as well as during the vertical lift; were not removed and inserted under other bands which had not been subjected to that strain; and no inspection was made by the petitioner to see whether the bands had been damaged during the break-out and dragging operation, although the uncontradicted evidence was that one bale out of every fifty would fall during the unloading operation [R89a].

We likewise disagree with the argumentative portion of the petitioner's statement beginning at the bottom of page 5 of its brief, but do not deem this an appropriate place to state the counter arguments which are made in later portions of this brief for the respondent.

SUMMARY OF ARGUMENT.

This case does not involve any right of the petitioner to jury trial under the Seventh Amendment. Respondent asserted a claim against the petitioner under a maritime contract to perform stevedoring services. A maritime contract is a proper subject of admiralty and maritime jurisdiction under Article III of the Constitution. As such it was not a suit cognizable at common law at the time the Constitution was adopted. In addition, the petitioner did not file a demand for a jury trial under F. R. C. P. 38. Its failure to demand a jury trial precludes the raising of a Constitutional issue. *United States v. The John R. Williams*, 144 F. 2d 451 at 454; 5 *Moore's Federal Practice*, page 344, note 2; *McAndrews v. U. S. Lines Co.*, 167 F. Supp. 41.

The indemnity aspect of this maritime contract between petitioner and the respondent was not severable so as to be triable as a common law action subject to the Seventh Amendment. *American Stevedores, Inc. v. Porello*, 330 U. S. 446 at 456; *Mowbray v. Merryweather*, [1895] 2 Q. B. 640 [C. A.]. The respondent here complied with all of the requirements of F. R. C. P. 50. It moved for a directed verdict in its favor upon its cause of action for indemnity against the petitioner and the examination of the legal question thus preserved is not even arguably a violation of any Seventh Amendment right.

There was no general verdict in favor of the petitioner but an answer to interrogatories upon special verdict. The grounds upon which the jury was to answer the interrogatories submitted to it were specifically delineated in the court's instructions to the jury. Petitioner may not now look to some other possibility, the criterion of its own imagination, and seek to support the jury verdict upon a ground which was not submitted to the jury by the instructions of the trial court.

No ground is "implicit in the jury verdict" which was not encompassed within the trial court's instructions. The

petitioner does not really meet this issue, but instead argues that a line of at least four recent decisions in this Court beginning with *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*, 350 U. S. 123, and ending with *Waterman Steamship Corporation v. Dugan & McNamara, Inc.*, 364 U. S. 421, should be re-examined and reversed.

Instead, respondent urges that every permissible ground for the jury's finding of respondent's negligence *vis-a-vis* the injured longshoreman-plaintiff required, as a matter of law, that the respondent should recover a judgment for indemnity against the petitioner. This result was required by the decisions of this Court beginning with *Ryan, supra.*

Respondent points out that a number of the arguments made by petitioner are not supported—or supportable—upon the record or by reference to other authorities. With respect to the cargo which was permitted to remain in the "square" of the ship's hatch while cargo was being unloaded at Philadelphia, there is great similarity to the winch shelter which was involved in this Court's decision in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 553.

The petitioner, the expert stevedore under contract to perform services for the respondent, cannot take refuge in a plea that the ship's officers should have intervened in the petitioner's cargo discharging operation and either prevented use of the method petitioner adopted or have stopped petitioner's operations altogether. To so argue is a complete distortion of the "warranty of workmanlike service" which the petitioner owed to the respondent.

Petitioner's argument that the contract in the present case is somehow different from all of the contracts in all of the cases which have been considered by all of the other courts which have decided this question will simply not hold water. This is particularly true when, seventeen years ago, the almost identical contract was before this Court in the case of *Joseph v. John T. Clark & Son*, 330 U. S. 422, and its meaning was then clear to the stevedoring industry.

ARGUMENT.

I. This Case Does Not Involve Any Constitutional Question or Any Seventh Amendment Right to Trial by Jury.

It has been said "habit has so much overlaid our thought in many practice matters that their skeletal anatomy ofttimes becomes blurred in our minds."[1] The respondents intend to meet this case upon its merits and to demonstrate that the judgment of the court below is correct. It is not, therefore, necessary that the respondents assume the burden of establishing as an affirmative proposition that a Seventh Amendment right of trial by jury is not involved in this case. No such Seventh Amendment right is in fact involved, and we think that clarity of thought will be aided by a definition of that with which we are dealing.

Every trial before a jury in a federal court is not necessarily a jury trial guaranteed by the Seventh Amendment. "The right of trial by jury was limited to actions at common law at the time of the adoption of the Constitution." *Institutional Drug Distributors v. Yankwich*, 349 F. 2d 566 at 569; *Dimick v. Schiedt*, 293 U. S. 474 at 476. The case at bar is a suit by the respondent against the petitioner. Ellerman, the respondent, having been sued by the original plaintiff, joined Atlantic under F. R. C. P. 14. The right which Ellerman asserted against Atlantic was based upon a contract to perform stevedoring services, a maritime contract. *Atlantic Transportation Co. v. Imbrovek*, 234 U. S. 52; *American Stevedores, Inc. v. Porello*, 330 U. S. 446 at 456. That a contract to perform stevedoring services is a maritime contract has been settled at least since the decision in *The George T. Kemp*, Fed. Cas. 5341.

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1. Wooley, in *The J. K. Welding Co. v. Gotham Marine Corporation*, 47 F. 2d 332 at 330.

When Ellerman joined Atlantic as a third party defendant, it made no demand for a jury trial. Atlantic made no demand for a jury trial when it filed its answer or at any other time. See Docket Entries [R1a, 2a], and compare F. R. C. P. 38. It is "in suits at common law" that "the right of trial by jury shall be preserved, and no facts tried by a jury shall be otherwise re-examined," etc. Ellerman's claim for indemnity against Atlantic, based as it was upon a maritime contract, was "the appropriate subject of admiralty jurisdiction." *The Moses Taylor v. Hammons*, 71 U. S. 411.

> "In this view of the subject, it follows, of course, that no jury was necessary, as it was a civil cause; and that the appeal to the circuit court was regular, as it was a cause of admiralty and maritime jurisdiction." *United States v. La Vengeance*, 1 Dallas 297, 1 L. Ed. 610 [1796].

The same cause of action Ellerman asserted against Atlantic might have been asserted by it in a separate action in admiralty based upon the averment that the right sought to be enforced was founded upon a maritime contract. True it is that many causes of action having their roots in things maritime are tried on the civil side of the courts. Causes of action under the so-called "Great Lakes Statute," 28 U. S. C. A. 1873, and the *Jones Act*, 46 U. S. C. A. 688, are examples of Congressionally created rights to trial by jury. Many cases are tried at what we will call, for brevity, a Rule 39 jury trial, but it is difficult to see that a party who has not even complied with the provisions of Rule 38 has a great deal of which it may complain, let alone assert a Seventh Amendment right. *McAndrews v. U. S. Lines Company*, 167 F. Supp. 41, specifically so holds. There is an extensive discussion to the same effect, 5 Moore's Federal Practice, page 344, note 2. See also *United States v. The John R. Williams*, 144 F. 2d 451 at 454.

It may be argued, in spite of the fact that respondent's claim against petitioner was founded upon a maritime con-

tract to perform stevedoring services and therefore rooted in maritime law, that the concept of indemnity itself has its roots in the common law. This Court has already answered that argument in *American Stevedores, Inc. v. Porello*, 330 U. S. 446 at 456. In that case it had been argued by the stevedore that an admiralty court did not have jurisdiction of the indemnity provision in the stevedoring contract involved in that case. This Court discussed the question and concluded:

> "To sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities would only needlessly multiply litigation. Such a provision is a normal clause in contracts to act for others and no more determines the nature of a contract than do conditions on the time and place of payment."

In addition to the reasons assigned by this court in its decision in *Porello*, the argument, if it should be made by the stevedore, is not historically accurate for there are instances of rights akin to that of indemnity in the maritime law as old as the Laws of Oleron and the Laws of Wisby. See Article V of the Laws of Oleron providing that if the mariners left the ship without the consent of the Master "and by that means she happens to be lost or damnified, they shall be answerable for the damage."[2] Compare also Article II of the Laws of Oleron and Articles XIV and XXXIV of the Laws of Wisby. The concept may have been first clearly enunciated in English law in *Hadley v. Baxendale*,[3] but was followed in English Maritime Law by the decision in *Mowbray v. Merryweather*, [1895], 2 Q. B. 640 [C. A.], which involved indemnification to a stevedore by a shipowner for damages which the stevedore had been compelled to pay one of his employees, injured by reason of a defect in a chain supplied by the shipowner to the stevedore.

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2. Vol. 30 Federal Cases, page 1172.
3. 9 EX. 341, 156 Eng. Repts. 145.

Clearly an indemnity provision in a maritime contract is not severable so as to make an action thereon one at the common law as opposed to one under the maritime law.

Our argument does not lead us to deny the propriety of this case having been tried to a jury, but only to point out that we are not dealing with a Seventh Amendment jury trial but with a trial before an advisory jury or a jury trial by consent. Since the language of Rule 39(c) would seem clearly applicable, so far as an advisory jury is concerned, whereas in order to have a jury trial by consent under that Rule both parties must give consent and thereafter the court "may order a trial with a jury," it would seem that, since no order was entered and no consent sought or given [except by implication], that the thing with which we are dealing is an advisory jury. Again, however, we are not forced to assume the burden of affirmatively establishing that position for we believe we can hereafter demonstrate that no matter which type of jury trial was involved, Seventh Amendment or Rule 39, the result below was correct and the judgment should be affirmed.

II. Appropriate Motions Under Rule 50(b) Having Been Made by the Respondent, the Legal Questions Were Preserved for Judicial Consideration and This Reservation Did Not Impinge Upon the Right of Jury Trial, No Matter What Type Jury Trial It Was, and the Court Below Was Not Only Free, But Was Bound to Examine the Legal Issues Thus Raised.

In reviewing this case in its setting it is necessary to recall that what was tried in the district court was essentially two separate causes of action, albeit the existence of the second was conditioned upon the existence of the first. The original plaintiff, an injured longshoreman, sued the respondent for personal injuries. He asserted a cause of action which was alleged to be founded upon two bases, unseaworthiness and negligence. The respondent, the original

defendant, filed its third party complaint against the petitioner, the stevedoring company which employed the plaintiff. The jury, answering interrogatories, found in favor of the plaintiff and against this respondent upon both grounds. The defendant, this respondent, had not traversed the issue of *how* the original plaintiff was injured, but it vigorously contested the legal question of its liability for unseaworthiness, and with respect to negligence asserted that the acts of which the plaintiff complained were not its acts and denied vicarious liability for them. It asserted that if, under the law, the plaintiff could recover against it, the respondent was, upon the negligence count at least, entitled to indemnity. The district court simply denied all of the post trial motions the respondent had filed.

The court of appeals found "it unnecessary . . . to consider the issue of unseaworthiness" [Opinion, R229a] but at least by footnote indicated concurrence with the view of the Second Circuit which had said "it was 'not disposed' to extend the doctrine of unseaworthiness to include 'cargo safe to handle' " [Opinion, R230a], and cited *Carabellese v. Naviera Aznar, S. A.*, 285 F. 2d 355 [1960]; cert. denied, 365 U. S. 872 [1961]. It affirmed the plaintiff's judgment against respondent upon the ground of negligence and then proceeded to examine the case wherein respondent sought indemnity from this petitioner.

The court of appeals, pointing out that error had been made in the charge of the jury [R228-229] to which exception had been taken and that a new trial would be required in any event, nevertheless reviewed the questions which had been reserved for judicial determination under F. R. C. P. 50(b).

It pointed out that respondent's liability to the original plaintiff was predicated upon the jury's answer to interrogatory No. 2 [R159a] finding Ellerman negligent. It then examined every ground of possible negligence on the part of Ellerman *which the court, in its charge, had submitted for jury determination* [Charge, R222]. These grounds were [R222]:

1. The use of the band-hook method of discharging the bales [R165a].

2. The failure of respondent's Mate to stop the discharge by such method [R166a].

3. The safe place to work theory in that respondent should have seen to it that the cargo in the center of the hatch should have been shifted or put out of the way [Charge, R166a; Opinion, R222].

The court of appeals, having examined all the possible grounds the district court had submitted as legally sufficient foundations for a finding of respondent's negligence *vis-a-vis* the plaintiff, applied to them rules of law which this Court has enunciated. Having done so, it concluded that upon all possible theories, respondent's motion for binding instructions [Point for Charge 3, R156a] should have been granted and that the district judge should have so ruled upon respondent's Rule 50(b) motion. The court of appeals therefore corrected that error and reversed as between petitioner and respondent.

The petitioner does not dispute the validity of a Rule 50(b) judgment nor say that it raises Constitutional questions under the Seventh Amendment. In effect, the petitioner shoots a sort of scatter gun; raises the spurious issue of a Seventh Amendment jury trial; and then takes off upon a vigorous but ill-conceived effort to bring about a reversal of what is now a whole line of decisions in this court upon the question of the shipowner's right to indemnity.

There was not a general verdict in favor of petitioner in this case. To determine exactly what issues a jury determines when it answers interrogatories upon a special verdict permissible under F. R. C. P. 49, it is essential to examine what issues were submitted to the jury and the charge of the court as to the issues it was submitting when the court requested answers to the specific interrogatories.

Although the charge is confusing, it is at least compact. The negligence issue was submitted to the jury as what the court said was "the second string to the plaintiff's bow" [R165a]. In just a few lines more than a single page in this record, the district court submitted the issue of respondent's negligence to the jury. It did so by paraphrasing arguments made by the plaintiff's attorney in his closing address. The first issue submitted was whether:

> (a) [the defendant failed to] "provide a safe place for this plaintiff who was injured to work; that their method of stowage, their method of pulling out this cargo, created a dangerous condition which provided a hazard to him working there." [R165a]
>
> (b) He buttresses this by saying that the chief officer, had expressed the view in his testimony that "this was a dangerous method of discharge" [Charge, R166a] and it thereby became the duty of the ship's chief officer "not only to warn them, but to stop the operation" because in failing to stop it he violated a duty owed to the injured plaintiff. [R165a, 166a]
>
> (c) Plaintiff "says further that it was negligence on the part of the steamship company to keep in a portion of the square of the hatch some New York cargo which was there; that that cargo either should have been shifted or it should have [been] put out of the way." [R166a]

The jury was not given, under the charge of the district court, any other ground which would form a basis for its finding of Ellerman's negligence. We will demonstrate that under the decisions of this court and others, an affirmative answer to such an interrogatory entitled Ellerman to the binding instructions it had requested and which the court had reserved under Rule 50(b).

Respondent's position can be stated briefly. If each and every one of the three grounds submitted to the jury by the court's charge is sufficient to form a basis for a jury

finding of negligence of Ellerman *vis-a-vis* the plaintiff, that same act breached the contractual duty which petitioner owed to this respondent to perform its operations under its stevedoring contract in a manner that this court has held such operations shall be performed. This was not "indifferen[ce] to the established basis upon which powers have been allocated between the court or jury" [Brief for petitioner, 15] but was an exercise of the judicial function which was committed to the courts under F. R. C. P. 50. It was in fact "a later determination of the legal questions raised by the motion" [F. R. C. P. 50(b)]. Surely the interpretation of rules of decision laid down by this court is a legal and not a jury question.

The court of appeals performed the judicial function, presuming that the verdict of the jury was rendered in accordance with the instructions which had been given it by the district court.

IF ATLANTIC'S METHOD OF PULLING OUT THE CARGO CREATED AN UNSAFE PLACE TO WORK, RESPONDENT WAS ENTITLED TO INDEMNITY AS A MATTER OF LAW.

Taking up in inverse order the points submitted for jury determination of the negligence question in the charge, we first discuss the unsafe place of work [R221]. If we set out the facts and the law applicable, the result will follow.

There was no evidence and nothing from which an inference could be drawn that the method of stowage was improper. Petitioner points to none because there is no such evidence. The cargo was "stowed all over the hatch just about level," [R16a] and was "stowed tight in tiers." No witness, expert or lay, criticized the way in which the cargo was stowed when petitioner's employees took "off the tarpaulins", opened the hatch and "remove[d] the beams" [R16a]. No one could fairly criticize the stow as it existed when the ship arrived and petitioner's employees took over the hold to perform their work of discharging.

"It is necessary, therefore, that every precaution be taken to prevent shifting [of cargo] of any sort [during the voyage]. The best preventive, of course, is to leave no space into which cargo may shift. It is primarily for this purpose that efforts are made to stow compactly and completely, and that dunnage is used to fill up spaces into which other goods will not go." Leeming, *Modern Ship Stowage,* Page 159, U. S. Department of Commerce.

No evidence was introduced, lay or expert, that it was in any way improper for petitioner to have the hold stowed so that approximately half of the cargo was for Philadelphia and half for another port. No one could fairly criticize that, for it is not only an approved method, but essential.

"A general rule that should be followed, unless circumstances absolutely prevent it, is to stow the cargo so that there is a fair or even distribution for each port over the different holds of the ship. For example, if there are 500 tons of cargo for a certain port to be loaded into a vessel having five holds, approximately 100 tons should be placed in each hold; not 20 tons in one hold, 250 tons in another, and so on." Leeming, *Modern Ship Stowage,* Page 107, U. S. Department of Commerce.

" 'To start with, the holds and the 'tween-decks will be divided in two, the forward parts of the forward hatches for' Point A and 'the after parts for' Point B. 'In the after compartments, the forward parts will be used for' Point B and 'the after parts for' Point A." Garoche, *Stowage, Handling and Transport of Ship Cargoes,* Page 155, Cornell Maritime Press.

There are good and essential reasons for all this. A ship must be loaded so that the whole is seaworthy. Concentration of weight, even the height of cargo, within a

cargo hold may have adverse, even dangerous, effect upon trim and upon the all important metacentric height. Empty compartments next to loaded ones result in longitudinal strains.

> "For the vessel, distribution should be made so that she is in the most seaworthy condition from departure to arrival. That is to say, the weight on board should be properly distributed for purposes of trim and transversal stability. Then it is necessary to make sure that the vessel is within the limits of difference in drafts and stability (GM) which have been fixed, as well for a long passage as for runs from port to port." Garoche, *Stowage, Handling and Transport of Ship Cargoes*, page 38, Cornell Maritime Press.

> "The point to be made here is that improper longitudinal distribution of weights does contribute to structural failures of ships." Sanerbier, *Marine Cargo Operations*, page 40, Wiley & Sons, New York.

Petitioner seems to infer that because the cargo not discharged at Philadelphia was called "New York" cargo and the ship had been to New York, there could be some inference of negligence. But there was not an iota of evidence upon that point, and in fact there could not fairly have been for reasons referred to above. True, the ship had already stopped once at New York, but from there had proceeded to Boston, then to Philadelphia, and from Philadelphia was bound for Norfolk and Baltimore before *returning to New York* to begin its outward voyage. To have removed all cargo from the forward-most cargo hold before undertaking the sea transit to Norfolk would have been grossly improper seamanship[4] and, of course, no witness

4. Compare "Proceeding of the Merchant Marine Council, U. S. Coast Guard", Vol. 18, No. 11 [Nov. 1961] where the report of Admiral Richmond into the causes of the breaking in two of the S. S. Pine Ridge states [p. 206] ". . . it is considered that the principal cause of this casualty was improper ballasting".

even suggested that it should have been done or that good practice required it.

More important, however, is the fact that there was no jury finding on this point because the court's charge did not submit that question for jury determination.

The evidence in this case was that this system of a "split hatch" was frequently encountered [as it would have to be on a ship in common carriage], and petitioner's employees "were experienced and familiar with that situation" and "knew what to do" [R33a, the testimony of petitioner's hatch boss].

Thus the district judge was correct when he refused to charge that respondent should have so arranged the stowage as not to "require either stowage to be removed" [R177a]. There was not an iota of evidence that this "split hatch" stowage was improper and in fact there could not have been. A hatch full of gunnies for Philadelphia alone might have made easier work for petitioner, but the split stow was by no means improper and no one so testified.

The charge did submit for jury consideration, however, the question of whether the cargo destined for another port "should have been shifted" or "put out of the way" [R166a]. This is a different question and respondent, having paid the judgment following denial of certiorari upon its Petition in No. 284, does not attack the negligence finding as it was submitted to the jury upon this ground. The question is, whose negligence? That brings us to the law applicable to this factual picture.

EVERY GROUND OF RESPONDENT'S NEGLIGENCE VIS-A-VIS THE INJURED PLAINTIFF SUBMITTED TO THE JURY REQUIRED PETITIONER TO RESPOND IN INDEMNITY AS A MATTER OF LAW.

Much of petitioner's argument seems directed to a veiled attack upon the line of decisions of this Court beginning with *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124. It seeks to distinguish *Ryan* and the cases

which have followed it [Petitioner's Brief, P22-38], but its brief is conspicuous by the absence of fact references to the record in the case at bar which might arguably support the distinction sought to be made. It argues, for example [Brief for Petitioner, 29], that "in *Weyerhaeuser* there was a *direct contract*," [5] but draws no distinction aside from the inference that in the case at bar there was something different. There is not. See the contract [R147a] and the third party complaint [R10a] and petitioner's answer [R12a].

Petitioner refers to the contract in the *Ryan* case as if it were different on the ground that there the stevedore "agreed to perform *all* [6] of the shipowner's stevedoring operations at the time and place . . ." [Brief for Petitioner, 24]. Does petitioner seek to infer that in the contract in the case at bar the agreement was that petitioner should perform something less than "all" of the stevedoring services for respondent? Some such distinction is necessary to the argument petitioner makes *unless* it would have this Court now reverse the entire line of cases beginning with the *Ryan* decision.

A Contract to Perform Stevedoring Services Includes the Implied Warranty of Workmanlike Service.

The line of decisions which petitioner attacks began with *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*[7] This Court said that the contract under which the stevedore in that case undertook its operations necessarily included the obligation to perform properly, safely and with competency. This warranty of the petitioner to its customer, the respondent, is of the very essence of the contract for professional services [350 U. S. 133]. The obligor under such a contract "must answer for the damage if the quality of

5. Emphasis in Original.
6. Emphasis in Original.
7. 350 U. S. 141.

the service is lower than the standard". *Schubert v. Schubert Wagon Co.*, 249 N. Y. 253 at 257 [Cardozo, C. J.]

This obligation of a contractor to perform the services it undertakes implies the promise to work competently and safely and is as much a rule of maritime law as it is of the common law. It has been said that breach of it sets up "a time-honored traditional maritime cause of action for failure prudently to perform." *Southport Transit Co. v. Avondale Marine Ways*, 234 F. 2d 947 at 951. There are a host of authorities supporting the concept of indemnity as reimbursement for damages suffered as the result of a breach of duty—usually a duty arising out of contract—owed by the indemnitee to the indemnitor.[8]

An agreement by contract to perform work carriers with it the undertaking by the party which is to be the actor that it will carry out the work in a careful and prudent manner and that it will indemnify the other party to the contract where, because of a breach of duty owing under the contract, the promisee has been subjected to liability to

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8. *Hadley v. Baxendale*, 9 Ex. 341; 156 Eng. Repts. 145;
Mowbray v. Merryweather, [1895] 2 Q. B. 640 (C. A.);
Weinstock—The Employer's Duty to Indemnify Shipowners, etc., 103 U. of Pa. L. R. 321;
Boston Woven Hose, etc. v. Kendall, 178 Mass. 232 [Opinion by Holmes, J.];
Schubert v. Schubert Wagon Works, 249 N. Y. 253 [Opinion by Cardozo, C. J.];
States S. S. Co. v. Rothschild International Stevedoring Co., 205 F. 2d 253 (C. A. 9);
Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co., 10 F. 2d 769;
Seaboard Stevedoring Corp. v. Sagadahoc S. S. Co., 32 F. 2d 886;
American President Line v. Marine Terminals Corp., 234 F. 2d 753; cert. den. 352 U. S. 926;
United States v. Arrow Stevedoring Co., 175 F. 2d 329; cert. den. 338 U. S. 904;
Calmar Steamship Corp. v. Nacirema Operating Co., 266 F. 2d 79; cert. den. 361 U. S. 816;
American Export Lines v. Revel, 266 F. 2d 82.

third persons. *Restatement of the Law of Contracts*, § 334; *Restatement of the Law of Restitution*, part 1, chapter 3, topic 3; Introductory Note, page 328, 329, § 93-96; *Restatement of the Law of Agency*, § 401(c). The maritime law is identical. *Mowbray v. Merryweather*, [1895] 2 Q. B. 640 [C. A.]; *Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co.*, 10 F. 2d 769. See also this Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co.*, 350 U. S. 141 and the cases which have followed it, not only in this Court but in the inferior courts.

It follows under this well-established rule, therefore, that if respondent's liability to the original plaintiff resulted from the breach by petitioner of a duty owed by petitioner to the respondent, the judgment below imposing that liability for indemnity was right. It is not a jury question at all once the facts which form the basis of the imposition of liability upon the respondent have been established, if all three possible grounds upon which the jury could have made its finding within the framework of the court's charge to it lead to the same result. It is, of course, the "exclusive power" of juries to weigh evidence and determine contested issues of fact". *Berry v. United States*, 312 U. S. 450 at 453. Here, however, the facts had been established. The jury found the respondent negligent upon one of the three permissible premises for such a finding which the charge of the court submitted for jury determination. All of the grounds submitted required indemnification as a matter of law.

Since we are here examining the "safe place to work" concept and respondent's initial liability under it, an examination of what issue the charge of the court submitted to the jury for determination upon that ground is not only of assistance, it is essential. The charge instructed the jury that it could find Ellerman guilty of negligence *vis-a-vis* the plaintiff for keeping certain cargo in the square of the hatch when it "should have been shifted" or "put out of the way" [R166a].

The petitioner had undertaken to do the stevedoring work and nothing in the contract indicates any intention that it was to do *less than all of the work* which expert workmanship would require be done. If the presence of cargo intended for another port created a hazardous condition so that the portion of it in the square of the hatch should have been "shifted" or "put out of the way", does the petitioner suggest that respondent should have hired some other stevedore to perform that work? That is where its argument leads.

It is the petitioner which holds itself out as an expert in the technical side of ship loading and unloading and it is petitioner which undertakes to do that work safely, properly and in a manner "comparable to a manufacturer's warranty of the soundness of its manufactured product" 350 U. S. 133, 134. Cf. *Cornec v. Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502; cert. denied 284 U. S. 621; *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 553.

It is impossible to draw a rational conceptual difference between this case, and the basis of the possible jury finding we are here discussing, and this Court's decision in *Weyerhaeuser*. In *Weyerhaeuser*, a shelter had been built on the deck by workmen at New York. There it was "implicit in the jury verdict" that the shelter was on the ship when it arrived in Boston.[9]

Although Weyerhaeuser's liability to the injured longshoreman might have been predicated on "its failure to inspect, detect and correct the unsafe condition of the shelter, that would not prevent the recovery of indemnity" [355 U. S. at 568]. So here, the presence of the "New York" cargo, while it might have been sufficient basis for respondent's liability to the injured plaintiff, would, under *Weyerhaeuser*, entitle respondent to indemnity from the

9. It is significant for the purposes of our case to note that in *Weyerhaeuser* this Court looked to what was "implicit in the jury verdict" and, in seeking, examined the instruction of the trial court to the jury upon the point.

petitioner and this result would follow by application of established rules of law, for the jury's function had already been performed. The facts had been established, and nothing remained but application to the factual situation of established legal principles. This petitioner, having held itself out to its customer as an experienced and competent stevedoring contractor, had the duty to perform the task which it had undertaken carefully and completely. This was the very essence of its contract, and it was breached when it permitted its employees to work aboard respondent's vessel under conditions which had been made dangerous by the very operation being performed, unless, of course, the contractor "shifted" or "put out of the way" the other cargo, the presence of which created the dangerous condition. It must be kept in mind that this dangerous condition did not exist when the petitioner began its work, for then the stow of the cargo throughout the hold was level [R16a].

There is no essential difference between the action of this petitioner in permitting its employees to work in a place which became unsafe as the work progressed (in the absence of shifting of other cargo) and the action of the stevedore in *Weyerhaeuser* in permitting its employees to use the shelter without inspecting it and correcting any dangerous condition found to exist. There is no essential difference between this case and *American President Line v. Marine Terminals Corp.*, 234 F. 2d 753; cert. denied 352 U. S. 926, where the stevedore was held liable to indemnify because it had continued its cargo operations in the vicinity of a beam, the safety latch of which was missing or broken, after it had knowledge of the unsafe condition. In the case at bar, since the cargo "was stowed all over the hatch just about level" [R16a] when the petitioner began its operations and the work it was performing of removing Philadelphia cargo was the thing which brought about the unevenness or ledge, it, under the hypothesis we are discussing, made the place of work hazardous and unsafe because such other cargo as extended into the "square of the hatch"

was not "shifted" or "put out of the way". It was petitioner, the "expert", which not only had firsthand knowledge of the condition but it was in the best position to recognize the potential hazard it created. The breaking of bands upon the bales was foreseeable under the testimony of petitioner's own witness, Wheeler [R128(b), Opinion, R224]. Petitioner's conduct came close to recklessness when it is considered that the evidence of its own employees indicated that no one had ever shown the men how the work should be performed properly [25a, 26a, 47a, 55a and 56a], although petitioner was the only company for which these men unloaded the particular commodity in question [37a] and petitioner's practice was to "break" the bales out of tight stow, drag them across other cargo in the hatch and then raise them vertically without changing the position of the hooks, inserting the hooks in different bands which had not been subjected to that strain or taking any other precaution by way of inspection [25a].

Under hypothesis #3 in the court's charge to the jury, the "safe place" theory, it seems abundantly plain that the petitioner breached its contractual duty owed to the respondent as that duty has been defined by this Court. The measure of damages for that breach is reimbursement to the respondent. It is generally recognized that reimbursement is the proper measure of damage where a breach of contract foreseeably subjects the customer to liability to others. *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Co., supra; McFall v. Compagnie Maritime Belge,* 304 N. Y. 314 at 330. See also the authorities cited in footnote 9.

THE USE OF THE HOOK-UNDER-BAND METHOD OF DISCHARGING AND THE FAILURE OF THE SHIP'S OFFICERS TO PREVENT THE STEVEDORE FROM USING THAT METHOD OF DISCHARGING WOULD REQUIRE INDEMNIFICATION IF RESPONDENT'S ORIGINAL LIABILITY WAS PREDICATED THEREON.

The same decisions, particularly decisions by this Court, which have already been cited are equally applicable here. In *Ryan v. Pan-Atlantic*, the argument was advanced that the ship's officers in that case failed to discover and correct improper stowage. This Court said:

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, the contractor, as the warrantor of its own services, cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense. Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach." 350 U. S. 134, 135.

As the court below points out "it was" petitioner's "method of pulling out the cargo, not" respondent's [Opinion, R223]. The ship was under no duty to tell the stevedore anything it would know if it knew its business. *Hastorf Contracting Co. v. Ocean Transportation Corp.*, 4 F. 2d 583, affirmed 4 F. 2d 584:

> "The stevedoring company owes to the vessel and her owners due care in the loading; but the vessel and her owners owe no such duty to the stevedoring company." *Cornec v. Baltimore & Ohio R. Co.*, 48 F. 2d 497, 502; cert. denied 284 U. S. 621.

The *Cornec* case was cited with approval by this Court in *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355

U. S. at 568. It is the stevedore who is in charge of the operation, and the ship's "master had no duty or right to supervise as to the instrumentalities adopted and methods used". *Cornec v. Baltimore & Ohio R. Co., supra.* The ship's officer here did all that he was reasonably required to do when he suggested to one of petitioner's supervisory employees that the unloading should not be carried out in the manner in which it was being performed because of the danger involved [R66a]. It is plain that the ship's officer did not "consider it safe, however, I am not a stevedore" [R69a].

Some of petitioner's argument seems to be predicated upon the proposition that the ship's officer owed a duty to petitioner to compel petitioner to stop the work instead of merely "suggesting" that it be performed differently. But this is not a duty respondent owed to the expert stevedoring contractor which had undertaken to perform the work of unloading. Otherwise the non-expert would be extending a warranty to the expert. If petitioner warranted "workmanlike service" and cannot use respondent's failure "to discover and correct" [*Ryan*] an unsafe condition or require an independent stevedoring contractor to perform the work in a particular manner, then petitioner's argument leads it to unsound ground. Petitioner is, in effect, arguing that the respondent owed petitioner a duty to "shift" or "put out of the way" the bales which made the workplace hazardous, but this is not in accordance with the contract nor is it possible in a practical sense. Ship's officers and crew members are engaged in navigation. Cargo cannot be satisfactorily handled at sea. Nor was the respondent required to hire another stevedoring contractor to perform the work which the petitioner was obligated to perform under its contract.

Petitioner even suggests reversal [Brief, page 35] upon the ground of incomplete draftsmanship. Petitioner suggests that the contract does not designate with specificity those areas of responsibility as between the stevedore and shipowner. The argument is spurious.

If the Court will refer to the cases of *Carter & Weekes Stevedoring Company* and *Joseph v. John T. Clark & Son*, Nos. 29 and 30, October Term, 1945, 330 U. S. 422, it will find reproduced beginning at page 85 of the record several contracts for stevedoring services between shipowners and other companies within the same industry. Oddly enough Exhibit 9, page 89 of the record in that case, is a contract wherein Ellerman & Bucknall Steamship Company is a party. That company is the one which entered into the contract now before this Court in the case at bar. See the record in this case, R147a.

In the *Joseph* case, the stevedoring industry was seeking exemption under the Commerce Clause of the Constitution from locally imposed taxation. The stevedore's argument in that case was that contracts, in all important respects identical with the contract in the case at bar, constituted the stevedore an integral part of the transportation process. The contract there and the contract here contained identical wording. In each, the stevedore:

> "Shall take the delivery of goods whether by land or by water at the point where the shipper is bound to deliver them . . . ; transport the cargo to and load on board carrying steamers with all due dispatch and safely and properly stow same . . . etc." [R147a]

On arrival of a ship for unloading, the stevedore:

> "Shall break out, discharge and place the cargo on the wharf or into craft as required, etc." [R147a]

The stevedore in that case did not have any doubt that it took over and performed for the steamship company the entire operation and that "during the course of respondent's operations, respondent assumed responsibility for all damage to or loss of freight, injury to its own employees, and to third persons and damage to the ship". See Brief

for Respondent in No. 30 October Term, 1945, page 3. The respondent here urges precisely the same interpretation of this substantially identical contract as the stevedoring industry placed upon the contract when the situation was reversed so far as benefit to the litigant was concerned. If that was a correct interpretation of the contract in 1945 when the stevedoring industry sought exemption from locally imposed taxation upon the ground that it was exempt under the Commerce Clause, it is still a proper interpretation of the contract today. Under it the judgment below should be affirmed.

Joseph v. John T. Clark & Son, 330 U. S. 422, is interesting also in the light of the argument of ambiguity which petitioner makes in reliance upon what we conceive to be a misinterpretation of this Court's decision in *American Stevedores, Inc. v. Porello,* 330 U. S. 446.

The decisions in *Porello* and in *Joseph* were handed down the same day and both were written by Mr. Justice Reed. In *Porello* it is true that the Court remanded the case to the district court because of a contention made by the stevedore in that case that there was ambiguity in the contract which was before the Court in *Porello.* There is no suggestion in the opinion in the *Joseph* case, however, that there is ambiguity and it is not to be presumed that the Court, interpreting two stevedoring contracts in decisions handed down the same day, would ignore possible ambiguity in one while remanding the other to clear up alleged ambiguity. In this connection it is interesting to note that upon remand the stevedore which had alleged ambiguity was not able to produce any evidence of it and Judge Kaufman, interpreting the contract, held that it required the stevedore there to indemnify the shipowner. *Porello v. United States et al.,* 94 F. Supp. 952 at 954.

What has been said disposes largely of the petitioner's argument [Brief, 31, et seq.] that this Court has never defined "what conduct of the shipowner will bar indemnity". If the contract here is as clear as the stevedoring

industry successfully argued it was in the *Joseph* case, then the case at bar does not present a factual situation appropriate for consideration of the question of what conduct of the shipowner will bar indemnity. *Ryan; Weyerhaeuser; Crumady v. J. H. Fisser*, 358 U. S. 423; *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U. S. 421, and a host of lower court decisions[10] have already held that the shipowner is entitled to rely upon the expertise of the stevedore and the shipowner's failure to discover and correct a dangerous condition created during the course of the work is not such conduct as bars the right of indemnity based upon improper performance by petitioner of its contract with the respondent. This is true no matter whether the negligence which fastened liability upon respondent to the original plaintiff was the failure of the mate to stop the work; the method of attaching hooks under the bales; or the failure to shift the cargo remaining in the hold and intended for delivery at another port. Since "when" the stevedore "takes control, the cargo is already in movement and never stops while" the stevedore "handles it" and "it is not even arguable that there is any interruption in the continuity of the transit" [Brief for Respondent, No. 30 October Term, 1945, pages 25 and 26], it comes too late for the stevedore to argue that under this contract the respondent owes the petitioner any duty to supervise the petitioner's work or correct any condition which the petitioner as an expert should itself either prevent, or discover and correct.

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10. Among others see *American President Line v. Marine Terminals Corp.*, 234 F. 2d 753; cert. denied 352 U. S. 926; *U. S. v. Arrow Stevedoring Co.*, 175 F. 2d 329; cert. denied 338 U. S. 904; *Calmar Steamship Corp. v. Nacirema Operating Co.*, 266 F. 2d 79; cert. denied 361 U. S. 816; *American Export Lines v. Revel*, 266 F. 2d 82; *United States v. Rothschild International Stevedoring Co.*, 183 F. 2d 181.

REBUTTAL TO PETITIONER'S BRIEF.

Assuming, arguendo, that in the district court this case had a trial by jury under Rule 39(c) by consent and order of court, in which case the "verdict has the same effect as if trial by jury had been a matter of right" [F. R. C. P. 39(c)], there is nothing requiring another trial of the issues between respondent and petitioner for the jury verdict established the factual basis for a judgment of indemnity as a matter of law.

After devoting forty pages of its brief to arguing the case which was actually presented, at page 41 of the petitioner's brief an entire new concept is injected. It is argued, for example, that respondent's negligence might have been found by the jury to have resulted from "the ship's failure to examine the bands of the bales at the time of stowage in India" and injects the "unseaworthiness" concept which was considered and rejected by the court below. Such argument ignores the fact that it has been established that respondent's initial liability to the injured plaintiff was predicated upon negligence by the court below which rejected the concept of "unseaworthiness" as a ground for liability. In so doing, it indicated its accord with the Second Circuit's decision in *Carabellese v. Naviera Aznar S. A.*, 285 F. 2d 355, and indicated it also "was 'not disposed' to extend the doctrine of unseaworthiness to include 'cargo safe to handle' " [Opinion, R230].

This portion of the petitioner's brief completely ignores the record in the case at bar. More than that, it argues a series of cases decided under state law [Brief, 43] which, on the subject of indemnity under a contract is quite different than the federal maritime law which this Court and other federal courts have enunciated. It cites and relies upon several cases from the Third and Ninth Circuits [11] which have been specifically disapproved by other courts.

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11. *Hagans v. Farrell Lines, Inc.*, 237 F. 2d 477; *United States v. Harrison*, 245 F. 2d 911; *Amerocean Steamship Co. v. Copp*, 245 F. 2d 291; *Hodgson v. Lloyd Brasileiro Patrimonio Nacional*, 294 F. 2d 32; petition for cert. pending 582 October Term, 1961.

In *Revel v. American Export Line*, 162 F. Supp. 297 at 288, the court said: "The indemnity feature in *Hagans* [12] appears to have been discarded." See also brief for the United States as amicus curiae (page 8) in *Weyerhaeuser v. Nacirema*, wherein these cases [with the exception of *Hodgson*] are cited and the brief states that these decisions "indicate that other courts of appeals have had difficulty in applying the teachings of this Court in *Ryan v. Pan-Atlantic.*" The petitioner's arguments on this point indicate confusion on the part of petitioner in differentiating between indemnity for breach of a duty imposed by contract and indemnity upon "the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence" [*Weyerhaeuser v. Nacirema*, 355 U. S. at 569]. This Court was at pains to point out in its decision in the *Weyerhaeuser* case that such theories were inappropriate "in the area of contractual indemnity".

At no place in its brief does petitioner really come to grips with the case which is before the Court. It nowhere recognizes that the charge of the court to the jury predicated a finding of respondent's negligence *vis-a-vis* the plaintiff upon an affirmative answer to any one of three theories submitted for jury consideration by the court's charge. Consequently it never argues that there was a view of the facts upon which the jury's finding of respondent's negligence could have been predicated without also finding that the stevedore failed to exercise that reasonable care which the law requires he shall exercise if he is to perform properly his contractual undertaking. The petitioner ignores completely the fact that the jury's answer to the interrogatory, asking the jury to determine whether respondent's fault arose "out of any failure on on the part of Atlantic and Gulf Stevedores to do its work in accordance with the contractual obligation" was predicated upon a charge which instructed the jury

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12. See Note above.

> "if there is any liability which" respondent owed to the plaintiff "that condition was *created* by Atlantic and Gulf Stevedores. That is your criterion: Did the Atlantic and Gulf Stevedores *create* the condition which made Ellerman Line and the City Line responsible to the plaintiff"? [Charge of the Court, R172a] [Emphasis ours.]

The negative answer to such an interrogatory is necessarily meaningless in view of the other answers of the same jury to interrogatories. The only factual findings to which petitioner can point is that it did not create the condition and that, as we have demonstrated, is not the criterion. See *Crumady v. The J. H. Fisser*, 358 U. S. 423, where this Court held that the act of the stevedore, which merely brought into play an unseaworthy condition of the vessel itself, amounted to a breach of the warranty of workmanlike service owed by the stevedore to the shipowner and imposed the obligation to make the shipowner whole.

Much of the petitioner's argument necessarily implies that the series of decisions of this Court beginning with *Ryan*, were incorrectly decided, for, argues the petitioner [Brief, 25], there was no express assumption by the contract of the duty to indemnify and, therefore, "there can be no action for indemnity" [Brief, 25]. The petitioner is under a misapprehension. For its failure to properly, reasonably and safely perform the work it undertook, breach of its contract results and from this breach contractual indemnity follows. This portion of petitioner's brief impliedly admits that we are dealing with a legal question and not a fact question, for interpretation of a contract is always a matter of law for the court and not a question of fact for jury determination.

This Court's decisions in *Weyerhaeuser* and *Crumady* are sufficient answer to petitioner's argument that negligence of the shipowner such as was involved here would be conduct "sufficient to preclude recovery" [Brief for Petitioner, 31]. The negligence of the shipowner in *Ryan;*

Weyerhaeuser and *Crumady*, was, in each case, sufficiently a "substantial factor". There had to be negligence of the shipowner amounting to a "substantial factor in causing the injury" in order to impose liability upon the shipowner initially in each of the cases just mentioned, yet each held that, because of the existence of the contractual relationship, the breach of the contract called the doctrine of contract indemnity into play in spite of the fact that the shipowners had breached duties owed to the injured man. The duties owed by the shipowner to the injured man are not the same as the duties petitioner owed the respondent and *vice versa*.

Petitioner makes the "written contract" argument but in order for that to succeed there would have to be a holding that because the contract was written the petitioner owed the respondent some duty of exercising less than due care in performance of the contract. That, of course, would be contrary to all of the decisions upon the point.

The petitioner seeks to resurrect the doctrine that since it is subject to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901, et seq. it is thereby immunized from all other forms of liability under contract. That argument was forcefully made to this Court in *Ryan* and rejected. The same arguments which petitioner makes, founded upon *Halcyon Lines v. Haenn Shipcoiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277 (1952), were made and considered by this Court in *Ryan* and rejected. The petitioner here has not been held liable in contribution; and the respondent never sought contribution, it sought indemnity. Negligence of the respondent *vis-a-vis* the original plaintiff is not germane to the question of whether the petitioner has performed properly the duties it owed to the respondent by reason of the contract relationship existing between those two.

RESPONDENT'S REPLY TO BRIEF FOR AMICUS CURIAE.

It is not surprising that the National Association of Stevedores files a brief in support of the petitioner, for the petitioner is a wholly owned subsidiary of the John W. McGrath Corp., "one of the largest stevedoring firms in the world" [R83a, 84a]. What is surprising is that the brief of amicus opens up the field of safety and division of responsibility as between shipowner and stevedore, fields in which the stevedoring industry is, by reason of its record and recent Federal regulations, particularly vulnerable. Before discussing that point, however, we discuss briefly what amicus refers to as the three claims of the plaintiff against the vessel on the ground of negligence [Brief for Amicus, page 6].

a.

Amicus first suggests that the respondent breached some duty it owed to the plaintiff when it failed to inspect the bands around the bales when the cargo was being loaded in India. This is a field in which the courts are not free, as they otherwise might be, to write upon a clean slate. The respondent is a common carrier and the cargo here in question moved subject to provisions of the Carriage of Goods by Sea Act, 46 U. S. C. A. 1300, et seq. That Act was passed as the result of an International Convention [Brussels, 1924]. Most of the commercial nations of the world passed similar legislation. Under these acts, the carrier is required to accept cargo and issue a bill of lading if the cargo tendered is in apparent good order and condition [46 U. S. C. A. 1303(2)(c)].

Such legislation would seem to preclude the argument that respondent could or should have rejected cargo simply because it had reason to believe that the expert stevedore

in the United States would place hooks under the bands during discharge. Surely a duty owing by respondent to petitioner cannot be thus forged out of mere argumentative suggestion, without evidence.

The way in which amicus suggests [Brief, p. 7] the jury's answer to the interrogatory favorable to petitioner should be reconciled would compel a conclusion that the jury applied law to the evidence which had not been part of the court's instruction to it. When it is considered there is no evidence on the point, lay or expert, and nothing about the point in the court's charge to the jury, it is not conducive to clarity to suggest that "something", [anything?] might support the jury's finding. Amicus may as well suggest some other arbitrary standard, such as the fact that the mate was a red-haired Irishman, as to argue seriously to this Court that a jury is free to impose its own arbitrary standards of conduct outside the legal principles given to the jury by the court's charge.

b.

Earlier in this brief we demonstrated that there was no evidence which would have supported a charge of vessel negligence, because cargo denominated "New York cargo" remained in the vessel while it was in Philadelphia. We pointed out that there are good and sufficient reasons why cargo compartments, particularly those at the very ends of the vessel, may not be empty in order to prevent what is technically known as "hogging" and consequent strain upon the ship's structure.

c.

Amicus' third argument on this point is that the respondent should have directed the petitioner, the expert stevedore, to cease work. No one has ever said that the condition was "irremedial" as amicus tags it. In fact, the charge of the court [R166a] suggested that there might have been a finding of negligence because this cargo was not "shifted" or "put out of the way."

The Problem of Safety Is, of Course, Important but Legislation and Regulations Promulgated Pursuant to That Legislation Have Already Entered the Field. This Court Should Not Take An Opposite Course.

We, of course, do not dispute that admiralty law is primarily judge-made law and that the policy of the law, including Congressional policy, has been in the direction of safety. On this score, the stevedoring industry is peculiarly vulnerable. The National Safety Council, *Report of Three Year Injury Rates, Reports to N. S. C., 1958-1960,* pages 36 and 37, shows that the rate of accident frequency for the stevedoring industry is 35.81 per one million man hours, about three and a half times the frequency rate for injuries on board cargo vessels and tankers, for which the same study shows a frequency rate of 9.98. The frequency rate for injuries aboard cargo vessels and tankers approximately equates the frequency rate for work injuries in the coated and glazed paper industry [9.96], whereas the accident frequency rate for the stevedoring industry exceeds that of logging [30.74].

The statistics which amicus cites—in an attempt to be objective and helpful, we are sure—are highly selective, for it has compared stevedoring with "all manufacturing" [Exhibit A-1 to Brief for Amicus]. However, it might have been more helpful had amicus referred the Court to the 1960 National Safety Council Report and made a comparison of stevedoring with "all industries" and not merely with manufacturing [1960 Report, National Safety Council, page 26]. To select "all manufacturing" is to include occupations [manufacture of ladies dresses would be an example] which do not afford a useful basis for comparison.

The recent regulations promulgated by the Bureau of Labor Standards of the Department of Labor, pursuant to 33 U. S. C. A. 941 [1958], place responsibility for safety squarely upon the employer. Under 29 C. F. R. 9.1 it is the employer who shall install, furnish and use safeguards.

Under 29 C. F. R. 9.3(d) masters, officers and crew members are specifically exempt. Section 9.4 imposes penalties upon the employer. It places the onus upon the employer to see that the ship's gear which is used is properly certified.

These regulations, in conjunction with the companion Coast Guard regulations applicable to ships, 26 Fed. Reg. page 1100-8 [Federal Register for November 23, 1961] provided [Section 31.01] for the testing of the ship's gear and issue of certificates; § 31.37-1 provides for periodic examination of ship's gear, and § 31.37-85 places upon the shipowner responsibility for having these tests conducted.

This is the delineation of responsibility which has been adopted. It is apparently unpalatable to amicus, for its long footnote 6 on pages 15 and 16, indicates reservation upon several points. It was to the employing stevedore, not the ship, that the Department of Labor issued "2506 notices of violations."[13] These "2500 unsafe conditions" were in violation of the longshoring and safety and health regulations.[14] After regulation was imposed (in March, 1960) upon the stevedore but before it was imposed (in 1962) upon the shipowner, the same report indicates [page 13]:

> "The 1960 Longshoring fatality rate has shown a 45% reduction from that of the previous year."

Amicus quarrels with success when it advocates that this Court, in a judicial decision, should now intrude upon a day to day operating program and relieve the stevedoring industry of some of the responsibility regulation has imposed upon it. Amicus' remedy suggests the ship's officers should now be made "experts" [Brief for Amicus, page 13] and direct the expert contracting stevedore to cease work because its operations have created a hazard.

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13. First Annual Report, Public Law, 85-742, Safety and Health Administration, U. S. Department of Labor, Bureau of Labor Standards, page 14.

14. Id. page 17.

For hazards having to do with the ship's gear, winches, hatch covers, etc., the newly promulgated Coast Guard regulations are the answer the experts in the field have devised to reduce accident frequency where ship's gear is involved. The regulations of the Bureau of Labor Standdards are the solution which the experts in the field have determined are best applied to and by the industry which amicus represents.

A ship's captain or mate is an expert navigator. He must be familiar with the wind, weather, tide, ship handling, the rules of the road at sea, ship's stability and structure. Heavy responsibilities are imposed upon him for the health and welfare of his crew and passengers. He must be an expert in the care and ventilation of cargo during carriage, with the propensities of hygroscopic commodities as well as of those commodities subject to damage by atmospheric changes producing ship "sweat". Now the stevedoring industry would make him also become an expert in that field of materials handling in which the stevedore specializes. Truly there is a limit to the expertise which may reasonably be required of a ship's officer.

The courts have imposed shipowner responsibility for failure of ship's equipment [*Seas Shipping Co. v. Sieracki*, 328 U. S. 85]. Whether to protect the stevedore against the claim for indemnity or to recover, under principles of subrogation, the workmen's compensation the stevedore has been required to pay to its injured employee, the industry now seeks to divest itself and to place upon the shipowner the responsibility which the regulatory agency, under Congressional mandate, has placed upon the stevedore.

Amicus refers to certain reports of the New York Shipping Association and reproduces them as an appendix to its brief [A-2, A-3]. They are headed, respectively, "Accidents due to equipment" and "Accidents due to operating conditions".

New York Shiping Association is an organization of stevedores. We do not know how objective the statistics

are or how large a segment of all accidents is involved. In contrast, the Bureau of Labor Standards Report showing number and percentage of all longshoring accidents, and comparing this with the North Atlantic Area [including New York specifically] is reproduced [15] at the end of this brief. In the over-all, it would seem to indicate quite a different picture.

CONCLUSION.

The court below properly applied established rules of decision to a fact situation as established by the judgment that respondent's liability was based upon negligence. Petitioner does not suggest how, at a new trial (which would be required under the opinion of the court below finding error in the charge to the jury [R229]), there would be any jury issue as between respondent and petitioner. No matter upon which ground the jury found respondent negligent, under the law all lead to indemnity as a matter of law. There is not factual or testimonial dispute requiring jury solution.

The judgment below should be affirmed.

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15. P. 21 of the Report cited at fn. 13 *supra*.

NORTH ATLANTIC AREA
LONGSHORING INJURY EXPERIENCE

Number and Percentage of All Longshore Injuries Reported in 1960

	Injury-type category	All injuries* reported		Number of injuries occurring and percentage distribution within area				
		National experience		Area experience		District distribution		
						Percent		
		Number of injuries	Percent of injuries	Number of injuries	Percent of injuries	Boston	New York	Philadelphia
1	Handling objects	8,476	28.0	2,332	23.5	18.7	24.7	21.7
2	Falling objects	4,180	13.8	1,633	16.5	17.4	16.1	17.4
3	Falls of persons	3,509	11.6	1,408	14.2	9.9	15.3	12.0
4	Moving objects	3,099	10.2	1,115	11.1	5.2	14.7	0.5
5	Stepping in or on objects	3,058	10.1	783	7.9	9.7	8.0	6.5
6	Striking against objects	2,228	7.3	782	7.8	8.9	8.6	6.5
7	Flying objects	2,034	6.7	713	7.2	17.2	5.0	10.4
8	Handtools	1,399	4.6	536	5.4	4.2	4.2	11.0
9	Others	2,189	7.3	606	6.1	8.6	3.9	13.6
Totals	Number of injuries	30,172		9,908		1,032	7,144	1,732
	Percent		100		100	100	100	100

*Source: 1960 injury data reported by the Bureau of Employees' Compensation on Form SD-1 (202).